1990

Holly M. Mahoskey and Charles Mahoskey v. Ogden Clinic, Dr. Boyd J. Farr and Dr. Christ Christensen : Brief of Respondent

Utah Court of Appeals

Richard W. Campbell; Campbell & Neeley; Attorney for Defendant/Respondent Ogden Clinic and Dr. Boyd Farr.
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DOCKET NO. ~~IN THE SUPREME~~ COURT IN THE STATE OF UTAH

HOLLY M. MAHOSKEY and CHARLES MAHOSKEY,

Plaintiffs/Appellants,

Case No. 900190

vs.

OGDEN CLINIC, DR. BOYD J. FARR and DR. CHRIST CHRISTENSEN,

[redacted]

Defendants/Respondents.

APPEAL FROM AN ORDER OF SUMMARY JUDGMENT
OF THE SECOND JUDICIAL DISTRICT COURT
FOR WEBER COUNTY, STATE OF UTAH
JUDGE RONALD O. HYDE

BRIEF OF RESPONDENT DR. CHRIS CHRISTENSEN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

COURT RULES

JURISDICTIONAL STATEMENT

The Utah Supreme Court has jurisdiction over this case pursuant to Utah Code Ann. § 78-2-2 (1953); and Article VIII, Section 4 of the Utah State Constitution.

STATEMENT OF ISSUES

1. The primary issue in this case is whether the trial court properly granted Defendants' motions for summary judgment based on the pleadings in the case as well as Plaintiff's deposition. The standard for review is set out in Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988).

2. Secondarily, there is an issue as to whether the Plaintiff is entitled to a jury trial, as a matter of right, on the issue of the statute of limitations, because of the bifurcation statute, Utah Code Ann. § 78-12-47 (1987).

CONTROLLING STATUTES

Utah Code Ann. § 78-12-14(1) (1979), provides:

> (1) No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered the injury, whichever first occurs, but not to exceed four years after the date of the alleged act, omission, neglect or occurrence. . . .

Utah Code Ann. § 78-12-47 (1971), provides:

> In any action against a physician and surgeon . . . for professional negligence . . . if the responsible pleading of the defendant pleads that the action is barred by the statute of limitations, and if either party so moves the court, the issue raised

thereby may be tried separately and before other issues in the case are tried. . . .

STATEMENT OF CASE

This case involves a claim for medical malpractice. The claimed malpractice took place in April, 1985. The Plaintiff did nothing to protect her claim until November, 1988. After taking the Plaintiff's deposition, the Defendants moved for summary judgment based on the applicable statute of limitations, Section 78-14-4, Utah Code Ann. (1979). The trial judge granted the Motion for Summary Judgment and also denied Plaintiff's Motion to Alter or Amend the Judgment.

STATEMENT OF FACTS

The Plaintiff's statement of facts is accurate, but is misleading and incomplete. It emphasizes only certain aspects of Plaintiff's testimony but does not give the Court the full basis upon which the trial judge granted Defendant's Motion for Summary Judgment. For those reasons, this respondent sets forth the following additional factual statements:

1. This case involves a claim of medical malpractice arising out of Defendants' alleged negligent failure to diagnose breast cancer on April 3, 1985.

2. On April 3, 1985, Plaintiff went to the Ogden Clinic, at which time Dr. Boyd Farr examined a lump on the Plaintiff's right breast. He then consulted with Dr. Chris Christensen

regarding the nature of the lump. Dr. Farr told the Plaintiff to return in three months to check the lump again. (Plaintiff's Deposition, p. 11).

3. During the next three months, the patient was instructed to examine herself regularly. Accordingly, at least once a week, she made self-examinations of the lump. She didn't notice any change in either the hardness of the lump, its location or its size until July of 1985. (Plaintiff's Deposition, pp. 14, 15).

4. "Just within probably a few days," the lump seemed to get much larger so the Plaintiff went to see Dr. Gardner for a different opinion. (Plaintiff's Deposition, p. 15).

5. When the Plaintiff saw Dr. Gardner in the middle of July, 1985, she was informed the lump was probably cancerous. (Plaintiff's Deposition, p. 16).

6. Dr. Gardner biopsied the lump on July 17, 1985. That same date Plaintiff received the results of the biopsy. She was informed by Dr. Gardner that the lump "was definitely cancer and that she needed to have surgery." When the Plaintiff asked him about the examinations by Defendants three months earlier, Plaintiff testified: "[Dr. Gardner] looked at the records and [Defendants] had measured it and he said it had grown about three times that size since my visit with him and it was definitely the same lump." (Plaintiff's Deposition, pp. 17-18, 23-25).

7. On July 19, 1985, Dr. Gardner performed a modified radical mastectomy to treat the cancerous mass in the Plaintiff's right breast. (Plaintiff's Deposition, p. 18).

8. As early as July, 1985, when she learned that she had cancer, the Plaintiff was upset with Defendants. She testified:

Q. Were you upset in July of 1985, emotionally upset with Dr. Farr when you learned that you had cancer?

A. Yes.

Q. Why were you upset with him?

A. Because I thought I trusted him.

Q. Why did you feel he had violated your trust?

A. Because I had cancer.

Q. And you felt he should have discovered the cancer in April, 1985?

A. Yes.

(Plaintiff's Deposition, p. 27).

Q. In July of 1985, when Dr. Gardner informed you you had cancer, you were upset with Dr. Farr because you felt he should have found the cancer that you believe to be the same one in April of 1985, correct?

A. Right.

(Plaintiff's Deposition, p. 28).

Q. At that time when you were told that and you thought back why didn't they diagnose it earlier, did you think that would have somehow made a difference in the treatment you received?

A. Yes, I did.

Q. Why did you think it would make a difference?

A. Because I thought they could have done a lumpectomy and maybe in that three month's time it hadn't spread, so maybe I wouldn't have had to go through the chemotherapy.

Q. And that's what you thought when Dr. Gardner told you you had cancer?

A. I didn't think about the chemotherapy, but I thought about the lumpectomy, that maybe that could have been done.

Q. Did you then think that maybe it would have resulted in a different prognosis as far as the ultimate outcome of your cancer?

A. Yes.

Q. Did you have somehow in your mind the thought that early diagnosis of breast cancer results in better cure rates?

A. Yes.

Q. And that went through your mind back when Dr. Gardner told you you had cancer in July of 1985?

A. Yes.

(Plaintiff's Deposition, pp. 36-37).

Q. You told Mr. Campbell a few minutes ago that when Dr. Gardner told you you had cancer following the biopsy you were angry; is that right?

A. Yes, I was.

Q. Were you angry at Dr. Christensen as well as Dr. Farr?

A. Yes.

Q. Were you more angry at one than the other?

A. No.

Q. Just both of them?

A. Yes.

Q. Why were you angry?

A. Because both of them had checked me out three months earlier and told me I didn't have cancer.

(Plaintiff's Deposition, pp. 35-36).

Q. You felt in your own mind at that time that Dr. Farr and Dr. Christensen had made a mistake?

A. Yes.

Q. You really felt they should have picked up this cancer in April?

A. Yes.

Q. And you still feel that way?

A. Yes.

(Plaintiff's Deposition, pp. 38-39).

Q. So you already had those feelings, didn't you, the feelings that they had somehow mistreated you?

A. Right.

Q. And you had those feelings for by them three years?

A. I didn't even start thinking about that until I was able -- of chemotherapy. I knew they had screwed up, but it wasn't on my mind every day.

(Plaintiff's Deposition, pp. 56-57).

9. The Plaintiff did not gain any factual information concerning either the injury she claims she has suffered, or the claimed negligence of the Defendants between August, 1985, and October, 1988. (Plaintiff's Deposition, p. 28).

10. The treatment for Plaintiff's cancer, including the chemotherapy, was completed in February, 1986. She had no further treatment by way of radiation therapy or chemotherapy after that time. (Plaintiff's Deposition, p. 19).

11. The reason the Plaintiff decided to make a claim against the Defendants was because she went to Dr. Stephan Ralston on September 9, 1988, to investigate the possibility of having reconstructive surgery done. She discovered that she probably could not afford to have the surgery, and that was what started her thinking about filing a lawsuit. It was nothing Dr. Ralston said about the treatment by Dr. Christensen or Dr. Farr that caused her to think she had a valid malpractice claim. (Plaintiff's Deposition, pp. 55-56).

12. Defendants were not served with a Notice of Intent to Commence Action until November 1, 1988, over three years after Plaintiff knew that Defendants had failed to diagnose her breast cancer.

SUMMARY OF THE ARGUMENT

1. The district court properly granted Defendants' motions for summary judgment because Plaintiff's claims were barred by the applicable statute of limitations. The Health Care Malpractice Act requires plaintiffs to commence suit within two years after they discover, or through the use of reasonable diligence should have discovered, the injury. Plaintiff's own

testimony established that she knew, or through the use of reasonable diligence should have known, that she had sustained an injury that was attributable to the alleged negligent conduct of the Defendant.

2. The Plaintiff has misconstrued the applicable test to determine when the statute of limitations begins. The criteria urged by the Plaintiff has no basis in fact or law.

3. Actual knowledge of medical negligence is not requisite to commence running of the statute.

4. The independent trial on the statute of limitations issue provided by the Health Care Malpractice Act is subject to summary judgment, like all other issues, if no genuine issues of material fact are raised.

ARGUMENT

POINT I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT. THE PLAINTIFF KNEW, OR SHOULD HAVE KNOWN, OF THE EXISTENCE OF HER INJURY AND THAT THE INJURY COULD BE ATTRIBUTED TO THE NEGLIGENCE OF DEFENDANTS.

The court is to grant summary judgment when it determines that "there is no genuine issue as to any material fact." Utah R.Civ.P. 56(c).

In Floyd v. Western Surgical Assoc., 773 P.2d 402 (Utah Ct. App. 1989), the Utah Supreme Court stated: "On appeal from a summary judgment, we view the evidence presented to the trial

court in the light most favorable to the losing party." Id. at 403. "When ruling on a motion for summary judgment, a trial court may consider the affidavits, pleadings, depositions, answers to interrogatories, and admissions on file." Utah R.Civ.P. 56(c); Floyd, 773 P.2d at 403.

In granting Defendants' motions for Summary Judgment, the trial court was faced with the issue of whether Plaintiff's claims were time-barred. The Health Care Malpractice Act states:

> No malpractice action against a health care provider may be brought unless it is commenced within two years after the plaintiff or patient discovers, or through the use of reasonable diligence should have discovered, the injury, whichever first occurs . . . .

Utah Code Ann. § 78-14-4(1) (1979). The trial court held that as early as July, 1985 Plaintiff had knowledge of the existence of an injury, its cause and the possibility of negligence.

Based on testimony by the Plaintiff during her deposition on September 29, 1989, the Plaintiff learned by mid-July, 1985, that Dr. Christensen failed to diagnose breast cancer during an examination in April, 1985. Another physician, Dr. Gardner, biopsied the lump and diagnosed cancer on July 17, 1985. The Plaintiff testified that by July she knew the doctors had missed the cancer and had they realized the full extent of her problems in April, she may have had better results.

Plaintiff's counsel asserts that the district court erred by not construing the facts in the light most favorable to the Plaintiff. Plaintiff's counsel offers no basis for this

assertion other than a legal conclusion that had the district court construed the facts in a light most favorable to the Plaintiff, it would have found that there was a genuine issue of fact.

Rule 56(e) of the Utah Rules of Civil Procedure sets forth that a plaintiff or defendant cannot rely upon the mere allegations or denials of her pleadings to avoid a summary *judgment but must set forth specific facts showing that there is* a genuine issue for trial. See Hall v. Fitzgerald, 671 P.2d 224, 226 (Utah 1983); Thornock v. Cook, 604 P.2d 934, 936 (Utah 1979).

The Plaintiff cannot rely on the bare assertion in her Complaint that she did not know that her injury was caused by another party's negligence to create an issue of fact that would preclude summary judgment.

In Foil v. Ballinger, 601 P.2d 144 (Utah 1979), the Utah Supreme Court held that in order for the statute to begin to run, the patient must know, or through the use of reasonable diligence should have known, that he sustained some injury and that the injury suffered can be attributed to the negligent conduct on the part of the Defendant. Id. at 155. From the quoted testimony under the "Facts" section of this Brief, it is clear that by July of 1985, the Plaintiff discovered an injury and attributed the cause of that injury to the alleged negligent conduct of the Defendant. Nothing more is required under Foil to trigger the running of the two-year statute of limitations. The Plaintiff's

deposition extinguished any issue of fact by explicitly setting forth that the Plaintiff knew on July 17, 1985 that Dr. Christensen had made a mistake by not discovering cancer in April and had Dr. Christensen detected cancer the results might have been less severe.

POINT II

THE COURT OF APPEALS CASE CITED BY PLAINTIFF DID NOT MODIFY THE LEADING SUPREME COURT CASE THAT SET FORTH THE CRITERIA FOR INVOKING THE STATUTE OF LIMITATIONS IN MEDICAL MALPRACTICE CASES.

Plaintiff's Brief asserts that the Foil case, 601 P.2d 144 (Utah 1979), was modified by Deschamps v. Pulley, 784 P.2d 471 (Utah Ct. App. 1989). Foil establishes that the statutory two-year limitations period does not commence to run until the injured person (1) knows or should know that she has sustained an injury, and (2) knows or should know that this injury was caused by negligence. Foil, supra at 147. Plaintiff's counsel misconstrues Deschamps to hold that the two-year statute of limitations period should not commence to run until the injured person (1) knows or should know that she has sustained an injury, and (2) knows, or with the exercise of reasonable diligence, should know of the existence of a reasonable possibility of medical negligence.

Aside from the fact that Court of Appeals decisions do not supersede Supreme Court decisions, nowhere in Deschamps does the

court state that they are modifying the Foil test. In fact, the court in Deschamps held that the plaintiff "knew or should have known more than two years before she filed this action that her mother's death was the result of the health care provider's negligence." Deschamps, supra at 475. This language is directly from the Foil test and mentions nothing about "reasonable possibility of negligence" as urged by Plaintiff's counsel. The court further stated that the plaintiff "was aware of her legal injury under the Foil test . . . ." Again, the court mentioned nothing about a modified Foil test.

Plaintiff's counsel bases his modified version of the Foil test on a portion of Hargett v. Limberg, F.Supp. 152 (D. Utah 1984) cited in Deschamps which states:

> [T]he crucial question is whether the plaintiff was aware of the facts that would lead a reasonable person to conclude that he may have a cause of action against the health care provider. Those facts include the existence of an injury, its cause and the possibility of negligence.

Hargett, 598 F.Supp. at 155 (citations omitted). After a few sleight of the hands, Plaintiff's counsel comes up with a new test that takes "reasonable person" and "possibility of negligence" and forms "reasonable possibility of medical negligence."

As stated previously, the court in Deschamps did not modify the Foil test and their holding confirms that they are applying an unmodified Foil test.

POINT III

AN EXPERT MEDICAL OPINION CONFIRMING MEDICAL MALPRACTICE IS NOT NEEDED BEFORE THE TOLLING OF THE STATUTE OF LIMITATIONS BEGIN.

Plaintiff contends that it is not reasonable to require a lay person such as the Plaintiff to make a causal connection between Defendants' failure to diagnose her cancer and any possible injury she may have suffered as a result, without first obtaining further information from some educated source.

In Deschamps, supra, the Court of Appeals responded to this assertion as follows:

> If we accepted [plaintiff's] position that she could not know of her legal injury until she received an expert medical opinion confirming malpractice, the statute would be tolled in every case until a plaintiff not only decided to seek, but found favorable expert medical testimony. We do not believe this result is consistent with the purpose of the statutory scheme.

Id. at 475 (footnotes omitted).

Plaintiff argues that because the doctor who supervised her chemotherapy and the doctor who performed her sterilization therapy would not confirm medical malpractice, the statute of limitations did not begin to run until such confirmation was obtained from an educated source. If Plaintiff's argument were taken to the extreme, it would mean that the statute of limitations would not begin to run until there was a jury verdict concluding that medical malpractice existed.

Similarly, as the court in Deschamps would not accept the position that an expert medical opinion confirming medical

malpractice is needed before the tolling of the statute of limitations begins, neither should the Plaintiff in the case at hand be allowed to do so.

POINT IV

THE INDEPENDENT TRIAL ON THE STATUTE OF LIMITATIONS ISSUE PROVIDED BY THE HEALTH CARE MALPRACTICE ACT IS SUBJECT TO SUMMARY JUDGMENT IF NO GENUINE ISSUES OF MATERIAL FACT ARE RAISED.

Plaintiff's counsel asserts that the Utah Supreme Court disfavors the granting of summary judgment in medical malpractice cases because of the existence of a statutory provision for a separate trial on the issue of the running of the statute of limitations. The statute says:

> In any action against a physician . . . if the responsive pleading of the defendant pleads that the action is barred by this statute of limitations, and if either party so moves the court, the issue raised thereby may be tried separately before any issues in the case are tried.

Utah Code Ann. § 78-12-47 (1971).

In addressing the application of an independent trial on the statute of limitations issue, the Utah Supreme court stated that "[i]t is, however, like all other issues, subject to summary judgment if no genuine issues of material fact are raised." Reiser v. Lohner, 641 P.2d 93, 100 (Utah 1982). See also Am.Jur.2d, Limitation of Actions, § 470; 61 A.L.R.2d 341.

Plaintiff bases her assertion on Justice Durham's holding in Brower v. Brown, 744 P.2d 1337 (Utah 1987). Plaintiff fails to

mention that Justice Durham's position was not a majority with respect to the issue on whether the plaintiff knew she had received a legal injury. Justice Zimmerman, for an equally divided court, held that as a matter of law the plaintiff was on notice that she had a legal injury and the trial court's summary judgment on this issue should be affirmed. Id. at 1340. Additionally, Justice Durham held that the trial court improperly granted summary judgment because the facts were unclear that the plaintiff should have known of her legal injuries when the negligence occurred. Id. at 1339. Nowhere in the opinion does it state that a motion for summary judgment in medical malpractice cases is disfavored where the issue is the running of the statute of limitations, as urged in Plaintiff's Brief.

CONCLUSION

The Plaintiff did not file her claim within the requisite time period. The logical extension of her argument would result in total emasculation of the Utah Healthcare Malpractice Act. Based on her own testimony, the trial court found that there is no genuine issue of material fact, and that opinion should be affirmed.

DATED this 6 day of August, 1990.

SNOW, CHRISTENSEN & MARTINEAU

By _____
David W. Slagle
Attorneys for Defendant\Respondent
Dr. Chris Christensen

AFFIDAVIT OF SERVICE

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

Rosario Flores, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for defendant Chris Christensen, M.D. herein; that she served the attached **Appeal From an Order of Summary Judgment of the Second Judicial District Court for Weber County, State of Utah, Brief of Respondent Dr. Chris Christensen** (Case Number 89-0901458, Second Judicial District Court) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Douglas M. Durbano, Esq.
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4185 Harrison Boulevard #320
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and causing the same to be mailed first class, postage prepaid, on the 6th day of August, 1990.

Rosario Flores

SUBSCRIBED AND SWORN to before me this 6th day of August, 1990.

NOTARY PUBLIC
Residing in the State of Uath

My Commission Expires:
14-94